DOCUMENT RESUME

ED 203 328 CS 206 351

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TITLE Newsroom Searches: The Probable Cause Dilemma.
PUB DATE Aug 81
NOTE 29p.: Paper presented at the Annual Meeting of the Association for Education in Journalism (64th, East Lansing, MI, August 8-11, 1981).

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Civil Liberties; *Court Litigation; *Federal Courts; *Legal Problems; *News Media; Newspapers; *Search and Seizure
IDENTIFIERS Privacy Protection Act 1980; *Probable Cause; *Search Warrants

ABSTRACT

As a means of providing additional search warrant protection for the news media and others engaged in public communications, the United States Congress adopted the "Privacy Protection Act of 1980." Legal and documentary research conducted over a period of two years has revealed a potential defect of the statute relating to the court system's loose interpretation of "probable cause," as stipulated in the warrant clause of the Fourth Amendment. Probable cause for the issuance of a search warrant exists where circumstances, as reported in an underlying affidavit, would cause a reasonably prudent person to believe that the property to be searched is likely to contain the items sought in connection with the related criminal act. However, an affidavit for a search warrant need not prove guilt in order to establish probable cause. The legal analysis of the "Zurcher v. Stanford Daily" ruling of the Supreme Court suggests that the legal effectiveness of the "Privacy Protection Act of 1980" may be impeded by a magistrate's broad, case-by-case interpretation of probable cause. Probable cause is an element that should be more definitively addressed in federal statutes aimed at providing additional search warrant protection. (HOD)

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NEWSROOM SEARCHES: THE PROBABLE CAUSE DILEMMA

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Presented to the Law Division, Association for Education in Journalism Annual Convention, East Lansing, Michigan, August 1981.

Introduction

On May 31, 1978, the U.S. Supreme Court held in Zurcher v. Stanford Daily[1] that neither the First nor the Fourth Amendment was violated by the issuance of a warrant to search for criminal evidence reasonably believed to be on the premises of a third-party newspaper. The decision sparked serious concerns among journalists and other professionals who perceived the ruling as a threat to confidence and privacy interests. After two years of hearings and debate, Congress adopted a federal statute aimed at remedying Zurcher. The Privacy Protection Act of 1980 was signed by President Carter on October 14th and prohibits federal, state, and local authorities from conducting surprise searches of newsrooms, except in limited circumstances.[2]

The Washington Post cheered adoption of the corrective legislation, stating,

> "The cheers are merited because this new law protects the news media and others engaged in public communications from surprise police searches."[3]

However, such positive responses from the journalistic community may prove to be premature. While the statute may provide some protection against third-party searches, it does not adequately address the issue of "probable cause," which was a decisive factor in the Supreme Court's ruling in Zurcher. Consequently, the intended protections of the Privacy Protection Act of 1980 may be impeded by a magistrate's case by case interpretation of "probable cause," as related to the warrant clause of the Fourth Amendment.

The Fourth Amendment and "Probable Cause"

The Fourth Amendment of the United States Constitution consists of two separate clauses: the freedom from unreasonable search clause and the warrant clause.[4] The relationship between the two clauses has caused uncertainty over the extent of a third party's protection from governmental search and seizure. Drafted specifically to limit invasion of personal privacy by government, the Fourth Amendment states,

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[5]

Thus, a finding of "probable cause" is a key prerequisite upon which search warrants will issue. Although probable cause may not be precisely defined in the practical sense, Black has theoretically defined the term as,

> "An apparent state of facts found to exist upon reasonable inquiry (that is, such inquiry as the given case renders convenient and proper), which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged, or, in a civil case, that a cause of action existed."[6]

Probable cause for the issuance of a search warrant exists where circumstances, as reported in an underlying affidavit, would cause a reasonably prudent man to believe that the property to be searched is likely to contain the items sought in connection with the related criminal act.[7]

Case law establishes that a showing of "probable cause" need not demonstrate certainty, but that it be more than mere suspicion. In Beck v. Ohio,[8] it was held that only the probability, and not a prima facie showing of criminal activity, is the standard of probable cause. The Supreme Court recognized in Brinegar v. U.S.[9] that "probable cause" was a less than perfect standard for balancing personal privacy and law enforcement interests:

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests."

Berger v. New York[10] established that "probable cause" generally exists where the facts and circumstances within policy officers' knowledge, and of which they have reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Further, case law has demonstrated that "good faith" on the part of a police officer is not sufficient to constitute probable cause.[11] Thus, a law enforcement officer may not satisfy the probable cause standard for obtaining a warrant by merely showing that he subjectively believes that a search could yield criminal evidence.

The many cases which have offered interpretations of probable cause generally support the view that the probable cause rule requires police not to conduct a search unless the information they possess shows that it is more probable than not that a particular person has committed a crime or that particularly described evidence will be found in the place sought to

be searched.[12] Probable cause to conduct a search or seizure may be based upon two general classes of information: (1) direct observation by the officer who is applying for the warrant, or (2) hearsay information furnished to the officer by a reliable informant.[13]

Rule 41 of the Federal Rules of Criminal Procedure specified the requirements for issuance of a search warrant:

> "A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government."[14]

Thus, to obtain a warrant, an officer must convince a judge or magistrate that there is probable cause to justify the proposed search. Information supporting probable cause may come from police officers, eye witnesses, criminal informants or other sources. Ultimately, the magistrate or reviewing judge must evaluate the nature and veracity of the information before determining if there is probable cause for a search warrant to issue.

Two conclusions essential to the issuance of a search warrant must be strongly supported by evidence. They are (1) the probability that the items sought are seizable by virtue of being connected with criminal activity, and (2) the probability that the items will be found in the place to be searched.[15] However, an affidavit for a search warrant need not prove guilt in order to establish probable cause.

Therefore, it is apparent that the Fourth Amendment probable cause test is theoretically sound, but, in practice, variable "imperfect." The Supreme Court noted in Brinegar v. United States[16] that the test requires less than evidence which would justify conviction, but more than bare suspicion. The Court, however, did not specify at what point between those two extremes

probable cause is to be located.[17] In making such a determination, a neutral magistrate is excused for making a mistake, as long as the mistake is one which could be made by a "reasonable man." These conditions may partially explain why application of the "probable cause" standard by magistrates is sometimes less than consistent.

In Zurcher v. Stanford Daily[18] the Supreme Court identified "probable cause" as the most critical element in determining whether a search was reasonable. For the first time, the Court ruled that third-party searches are allowed upon a finding of probable cause to believe that the third party possessed evidence of a crime. Although the third party, in this instance, was a newspaper, the Court's judgment poses serious implications for non-journalists, as well as journalists.

Zurcher v. Stanford Daily 436 US 547

FACTS and HOLDING

On April 9, 1971, officers of the Palo Alto Police Department went to the Stanford University Hospital, in response to a call from the hospital director, who sought removal of a group of demonstrators occupying the hospitals administrative offices. The demonstrators had occupied the premises since the previous afternoon and had chained and barricaded the glass doors at both ends of the hall adjacent to the office area when the police arrived. After several attempts to convince the demonstrators to leave peacefully, police officers entered the building forcibly at the west end of the corridor. Numerous reporters and photographers gathered at that end of the hall to watch the evacuation of demonstrators by police. During the encounter a group of demonstrators, armed with sticks and clubs, allegedly attacked and injured a contingent of nine police officers.[19]

After the evacuation of demonstrators at Stanford University Hospital, police were able to identify only two of their alleged assailants. The Stanford Daily, an independent, student-published newspaper, carried photographs and articles about the hospital protest in an April 11th special edition. The next day, April 12th, the Santa Clara County District Attorney's Office obtained a warrant to search the Daily's offices for pictures, film, and negatives of the hospital incident. The warrant was issued on probable cause that these items, showing demonstrators who had assaulted the police officers, would be found in the newspaper offices.[20]

Consequently, four members of the Palo Alto Police Department entered the newspaper's offices and examined the Daily's photograph laboratory, filing cabinets, desks, and wastepaper baskets. Locked drawers and rooms were not disturbed. The search lasted approximately fifteen minutes and failed to produce the unpublished photographs sought by police. Thus, the officers departed without seizing any property.[21]

On May 13, 1971, approximately one month after the search, several Stanford Daily staff members filed suit under section 1983 of Title 42 of the United States Code, alleging violation of their civil rights. The Daily also requested declaratory relief, arguing that the surprise search violated First, Fourth, and Fourteenth Amendments. The United States District Court[22] and the Court of Appeals[23] found for the plaintiffs, holding that the Fourth and Fourteenth Amendments barred issuing warrants to search the homes and offices of nonsuspect third parties unless there is "probable cause" to believe on the basis of sworn affidavits that evidence of a crime would be destroyed or that a subpoena duces tecum would be otherwise impracticable.[24]

On certiorari, the United States Supreme Court reversed the lower courts in a 5 to 3 decision, with Justice Brennan not participating. In

the majority opinion, Justice Byron White wrote that the Fourth Amendment did not bar warrants to search property on which there is probable cause to believe that evidence of a crime was located, even though a person owning or occupying such property was not reasonably suspected of complicity in the crime being investigated.[25] Secondly, the Court held that newspapers enjoyed no special right above ordinary citizens relative to the execution of a search warrant. Thus, the Court found there is no requirement that evidence sought must be secured by means of a subpoena duces tecum rather than a search warrant when a newspaper is the object of a third-party search.

The Supreme Court reasoned that the preconditions for a warrant--probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness--afford sufficient protection of First Amendment freedoms.[26] The Court's judgment in Zurcher reinforced earlier tenets rendered in Branzburg v. Hayes.[27] In Branzburg the Supreme Court held that a newspaper reporter possessed no First Amendment right to refuse to honor a subpoena ordering him to testify before a grand jury. In both Zurcher and Branzburg the Court rejected arguments that confidential news sources would dry up if journalists were bound to obey the same legal obligations as the average citizen. The notion that journalists deserved legal privileges above ordinary citizens was also not highly regarded by the Court in both cases.

"Probable Cause" According to Zurcher

It is clear that the Supreme Court's interpretation of "probable cause" pursuant to a search warrant was at odds with the interpretation shared by the United States District Court and the Court of Appeals, when the object

of the search warrant was a third party. The district court espoused a categorical rule which stated that where probable cause exists to believe that materials sought would be destroyed, or that a subpoena duces tecum is otherwise impractical, a third-party search for such materials violated the Fourth Amendment standard of reasonableness.

The Supreme Court rejected the district court's rule, holding that as long as "there is reasonable cause to believe the specific things to be searched for and seized are located on the property to which entry is sought," courts may not forbid the issuance of a warrant, merely because the owner or possessor of the place is not reasonably suspected of criminal involvement.[28] The two opposing applications of probable cause, as related to third-party searches, are the result of differing interpretations of the warrant clause and of the legacy which had been fashioned by several major cases relating to criminal evidence and search and seizure.

Prior to 1967, federal case law held that only contraband or fruits and instrumentalities of a crime were properly seizable, pursuant to a valid search warrant. In 1967 the Supreme Court abandoned this limitation on legal searches in Warden v. Hayden.[29] The Court held that "evidence" could constitutionally be seized and that the Fourth Amendment made no distinction between "mere evidence" and instrumentalities, fruits of a crime, or contraband. Thus, Warden v. Hayden expanded the scope of constitutionally permissible searches and seizures to include items of mere evidential value.[30]

Justice Stevens, dissenting in Zurcher, noted that a showing of probable cause, sufficient to justify a search warrant in the pre-Hayden era does not automatically satisfy the new dimensions of the Fourth Amendment in the post-Hayden era.[31] Stevens reasoned that in Hayden, the Court

recognized that the meaning of probable cause should be reconsidered in the light of the new authority it conferred on the police. Consequently, he explained, that a third-party search would only be justified when there is fear that if notice were given, the third party would conceal or destroy the object of the search.[32] Stevens thus argued that where police lack probable cause to believe that an unannounced search by force is necessary to prevent concealment or destruction of evidence, the ensuing search is unlawful.

Seven months after Hayden, the Supreme Court held in Katz v. United States[33] that the Fourth Amendment protects people and not places. In Katz the Court clearly emphasized that Fourth Amendment protections justify the citizen's reasonable expectation of privacy against certain types of governmental intrusion. The Fourth Amendment was found to have been violated by the interception of the defendant's telephone conversations by means of an electronic device attached to the outside of a public telephone booth.

During the same year in which Katz and Hayden were decided, the Supreme Court made a significant addition to its interpretation of Fourth Amendment "probable cause." In Camara v. Municipal Court[34] and in See v. City of Seattle[35] the Court held that a less stringent standard of "probable cause" is acceptable where entry is not to secure evidence of a crime against the possessor. In the two cases, the Court ruled that warrantless search provisions of city housing and fire codes violated the warrant clause of the Fourth Amendment.

In Camara and See the Court found that when entry is sought for purely civil purposes, the occupant of the premises to be searched possessed a lesser expectation of privacy than when criminal evidence was sought. The

traditional interpretation of probable cause, espoused by the Zurcher Court was embodied in Carroll v. United States.[36] In Carroll, a prosecution under the National Prohibition Act, the Court found that a warrantless search of the defendant's car for illegal liquor was lawful because of the "reasonable cause" officers had for believeing that the contents of the car offended against law. Correspondingly, in Zurcher, the Court found that once probable cause exists to believe a crime has been committed, a warrant may issue for the search of any property which a magistrate has probable cause to believe may be the place where evidence of the crime is located.[37] In recent years, several cases have embodied this view, among them United States v. Manufacturers Nat'l Bank,[38] Fisher v. United States,[39] and United States v. Kahn.[40]

In briefs filed by the respondents in Zurcher, attorneys for the Stanford Daily argued that the search of the Daily was unreasonable under the Fourth Amendment, because the action was directed at a party not suspected of crime.[41] The view conflicts sharply with the Zurcher Court's interpretation of Fourth Amendment probable cause and reasonableness. However, the respondents cited five reasons why evidence presented to the magistrate showed why the search was unlawful: (1) the third party to be searched held no relationship with any criminal suspect. such as would suggest a risk that evidence might be destroyed; (2) no likelihood existed that the evidence would be destroyed, as a result of the third party's status and demonstrated behavior; (3) lawful grounds might have existed to resist compelled production of the evidence sought; (4) the intrusive nature of the search invaded privacy interests of the third party and its confidential sources; and (5) there was otherwise no apparent reason shown why a subpoena would be impractical.[42]

The Search Warrant Versus the Subpoena Duces Tecum

Although the crucial determinants of Zurcher were chiefly Fourth Amendment considerations, at least two issues were raised relative to First Amendment freedoms. Before the Court's ruling as in the months that immediately followed, the journalistic community expressed concerns about the intrusiveness of third-party searches on the newsgathering process and the tendency for such searches to impede confidentiality by permitting the disclosure of confidential news sources.

Justice Stewart, dissenting in Zurcher, emphasized that police searches of newspaper offices burden freedom of the press in two ways: (1) the physical disruption which such searches entail tends to interrupt a newspaper's normal operations and to impair the processes of newsgathering, writing, editing, and publishing; and (2) the tendency of such searches to cause the disclosure of confidential information or of the identity of confidential sources impedes the constitutionally designated function of the press of informing the public.[43] The general result, according to Stewart and many journalists, is that the third-party search poses a potentially "chilling effect" on the newsgathering and news dissemination functions of the mass media.

Stewart argued that First Amendment rights of newspapers are more adequately protected by use of a subpoena duces tecum when police seek to obtain criminal evidence from these media. In examining provisions for the execution of a search warrant and a subpoena duces tecum, several significant differences are apparent relative to the privacy interests of journalists and non-journalists.

A search warrant is an order issued by a justice or other magistrate, in the name of the state, directed to a sheriff, constable, or other

officer, authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of a crime, or things otherwise criminally possessed.[44] Thus, a search warrant authorizes police to enter press facilities or a home to search for materials described in the warrant. A search warrant also tends to be "intrusive" in that it may be executed over the objections of the party who owns or occupies the place to be searched. Further, a search warrant may expose the privacies and confidential possessions of the party to police, during the search procedure.

While both search warrants and subpoenas must specify the object sought with particularity, the search warrant does not afford the victim of the search an opportunity to contest its legality, before the search occurs. Thus, the search warrant relies on an ex parte process to secure evidentiary materials. The search warrant also may be executed without providing the victim of the search advance notification of the impending action.

By contrast, a subpoena duces tecum is a process by which the court commands a witness who has in his possession or control some document or paper that is pertinent to the issues of a pending controversy, to produce it at a trial or hearing.[45] Thus, a subpoena duces tecum is a less intrusive means of obtaining evidence than a search warrant. A subpoena provides the named party with advance notice, while requiring him to personally produce certain specified items. Unlike a search warrant, a subpoena does not authorize forceful entry into the victim's private domain.[46] Most importantly, a subpoena duces tecum permits the named party to contest the legality of the order, by means of an adversarial hearing. Consequently,

the person subpoenaed may move to quash the subpoena by arguing that the information sought does not exist, is not in his possession, or is not material.[47]

The due process protections of a subpoena, coupled with its less intrusive nature, makes it a more preferred means of obtaining evidence from news media. The subpoena process prevents police from rummaging through a newspaper's confidential files, since the subpoenaed party is responsible for locating and transmitting the specific evidence sought to the proper authorities. Further, a newspaper or other news organization which opposes the terms of a subpoena may challenge it prior to its execution, as opposed to after the fact, the only recourse in the case of a search warrant.

Searches on Non-Journalists

The judgment of the Zurcher Court poses potential concerns for private citizens and professionals outside of the field of journalism. Justice Stevens, in dissenting, recognized this condition when he stated,

> "Countless law-abiding citizens--doctors, lawyers, merchants, customers, bystanders--may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious."[48]

Stevens also noted the adverse consequences that could result when a third-party search prompted the disclosure of personally private information which might damage another's reputation. Under Zurcher doctors and lawyers, like journalists, have no viable alternative when they become the victims of a surprise search. They may resist the warrant and violate the law or turn over the sought material without an opportunity to challenge the legality of the government's request.

The confidential relationship between doctor and patient, or lawyer and client is a necessary bulwark. Thus, the introduction of confidential matters into evidence poses a serious danger for the legal and medical professions, among others. The danger is already being encountered by attorneys. In recent years, there has been a noticeable increase in the number of search warrants executed upon lawyers' offices.[49]

The Privacy Protection Act of 1980 ... the Answer?

Justice White noted in Zurcher that "the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses of the search warrant procedure."[50] Within several weeks of the Supreme Court decision, House and Senate subcommittees held hearings to consider the potential dangers of Zurcher. During this period, the 95th Congress received nineteen bills aimed at modifying the Court's judgment.[51] The bills approached the problem in several similar ways. Some bills proposed protecting members of the press only from no-notice searches, and most would protect all third parties.[52] With regard to jurisdiction, some bills proposed restricting search warrants obtained by federal, state, and local law enforcement agencies, while other bills would only restrict search warrants obtained by federal authorities. Despite some slight differences, most of the bills embraced the "subpoena first" rule, while allowing limited exceptions where there was reason to believe that a third party would destroy evidence or in cases where the subject is a criminal suspect.

State legislatures also registered a dramatic response to Zurcher. Twenty-five states and Puerto Rico initiated actions to overturn the Supreme Court's ruling.[53] Meanwhile, nine states enacted laws restricting

law enforcement officials in their states from conducting newsroom searches, except in limited emergency situations.[54] At least three other states are considering enacting similar legislation.

A most impressive response to Zurcher came in the form of a Carter administration proposal, designed to limit the use of search warrants by federal and state law enforcement officials. The Carter bill proposed additional search warrant protection for the news media, authors, scholars, and researchers. Such protection would be available to any person who has collected information with a purpose to disseminate to the public of "a newspaper, book, broadcast, or other similar form of public communication in or affecting interstate or foreign commerce."[55]

The Carter bill was designed to protect information-gathering activities basic to the First Amendment by prohibiting searches for a work product (such as notes, photographs, tapes, etc.) of persons preparing materials for dissemination to the public.[56] The proposal permitted three exceptions to its prohibition: (1) when the person possessing the material sought is involved in a crime; (2) when the information sought relates to the national defense; and (3) when there is reason to believe that a warranted search is necessary to prevent death or serious bodily injury to a human being.[57]

Consequently, the Carter Administration bill eventually became the bill which went through Congress under the sponsorship of Representative Robert Kastenmeier of Wisconsin and former Senator Birch Bayh of Indiana. The proposed legislation was approved by the Senate August 4, 1980 under the classification (S 1790).[58] The House approved a similar bill on September 22, 1980, under the classification (HB 3486).[59] What was to become the Privacy Protection Act of 1980 was put into final form by a House-Senate conference committee and signed by President Carter October 14, 1980.

The new federal statute requires federal, state, and local law enforcement officers to obtain subpoenas when seeking evidence from writers, editors, scholars and others involved in news-gathering activities. It also requires the Justice Department to propose guidelines regarding the conduct of searches of other third parties.[60] The act restricts search warrants against any person who has collected information with the purpose of publicly disseminating a newspaper, broadcast or other form of public communication.

Generally, the Privacy Protection Act of 1980 permits several exceptions to the subpoena-first rule:

(1) Where there is probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the evidence is sought.

(2) Where there is reason to believe that the immediate seizure of the material is necessary to prevent death or serious bodily injury to a human being.

(3) Where giving notice pursuant to a subpoena would lead to the destruction, alteration, or concealment of the material.

(4) When further delay would threaten the interests of justice.[61]

The statute provides search warrant protection for "work product materials," such as interviews, story drafts, and internal memoranda.[62] Also protected are nonwork product "documentary materials," such as a hostage note, written by a third person and obtained by the press. The act permits damages of one thousand dollars, plus attorneys' fees, against federal, state, and local governments found in violation of the act.

Weaknesses of the Statute

In an editorial, the Washington Post criticized the Privacy Protection Act of 1980 for providing search warrant protection only for the news media and others engaged in public communications.[63] Because the files of psychiatrists, attorneys, and others may still be searched, pursuant to a warrant, the Post suggested that Congress faltered by not extending the statute's protections to the rest of the public. As the statute traveled through Congress, the main dispute was whether it would protect innocent third parties other than the press.[64] The statute does protect authors and scholars, but following protest from the Justice Department, congressional backers agreed to exclude other third parties, including lawyers and psychiatrists.

Other criticisms of the statute have been directed at the act's exemption relating to "when further delay would threaten the interests of justice." Some journalists are of the opinion that this standard is "too vague and creates a major loophole."[65] Perhaps the most serious criticism of the statute is that its language gives law enforcement officers broad discretion in framing their affidavits for a search warrant, under the rubric of "probable cause." The statute fails to define the term and does not adequately address the way the term might apply to the act's exemptions.

Erburu recognized this concern when she wrote,

> "Probable cause that the person may be involved in the crime under investigation could arguably be established with a simple showing of some continuous or recent association with the criminal suspect. Moreover, because during the early stages of an investigation there are often no certain suspects, magistrates may be willing to find that someone connected only circumstantially with the crime is

> sufficiently involved to fall within the exception. Thus, the vulnerability to search warrants under this formulation may be practically as broad as that established in the opinion of the Court in Zurcher."[66]

Thus, the statute could generate litigation which seeks to clarify the "probable cause" standard as it relates to the act's exemptions. As has been the case with shield laws, vagueness in defining the standard sometimes permits courts to avoid providing any uniform construction.[67]

The Zurcher Court recognized that the issuing magistrate was responsible for balancing First and Fourth Amendment interests, in determining the legality of a third-party search warrant. However, there are several problems with this rationalization. The ex parte nature of a search warrant denies the third party an opportunity to present his case, and thus, reduces the amount of information made available to the magistrate.[68] Because the magistrate's finding of "probable cause" may be based primarily on information provided by the requesting officer, the warrant procedure may be subject to bias.

In many instances, magistrates are expected to protect First Amendment rights of the press from overly intrusive searches, with no guidelines except for the standards of specificity and reasonableness. This condition could pose a problem for nonlawyer magistrates. Consequently, such concerns about the fairness and consistency of the search warrant procedure have lead former Senator Birch Bayh to write,

> "Justice Powell's hopeful assumption has proved to be erroneous. Raids on doctors' and lawyers' offices in California, Minnesota, and Oregon have proved that the issuing magistrate is not a bulwark

against intrusion on personal privacy, even when confidential relationships such as that of doctor-patient or attorney-client are involved."[69]

The statute's failure to address the "probable cause" standard appears to be a serious fault when examined in light of Zurcher and two similar cases which followed. Applying the new statute to the Stanford Daily search, evidence may, hypothetically, have been presented to satisfy one or more of the act's exemptions. The exemption under which a magistrate may have issued a search warrant against the Daily would be on grounds of probable cause to believe the evidence sought would be destroyed if notice were given pursuant to a subpoena. Such a ruling would appear possible, since the Daily reported destroying some of its work products on several occasions.

In May and July of 1980, two additional searches were conducted, involving third-party news media. On May 15th, police in Flint, Michigan searched the printing facilities of the Flint Voice, ostensibly looking for evidence that a city ombudsman's report had been leaked to the alternative, monthly paper.[70] Police officers seized billing statements and other bookkeeping information.

On July 26th, local Idaho law enforcement officials, acting under a search warrant, searched the newsroom of KBCI-TV in Boise and seized two video tapes recorded during two days of rioting at the Idaho state penitentiary.[71] The material was sought to help identify leaders of the prison disturbance, which involved the holding of two guards as hostages by inmates. The county prosecutor who obtained the search warrant, justified his action by citing Zurcher.

In both the Flint and Boise cases, there again exists doubt as to whether the Privacy Protection Act of 1980 would have prevented issuance of the search warrants, given the vagueness of the statute's exemptions. In either case, the circumstances could conceivably be interpreted by a magistrate as "probable cause" to believe that the third party possessing the evidence is involved in the criminal offense for which the evidence is sought. Based on this finding, a search warrant could legally issue.

Impact of Statute on State Remedies

The impact of the federal statute will be experienced by state legislatures in two significant ways. It will provide the only protection in 41 states which have not enacted laws restricting third-party searches.[72] Secondly, the act may provide additional protection in the nine states which have passed anti-search legislation. Most state exemptions to newsroom searches generally correspond with those exemptions embodied in the federal statute. Therefore, it would appear that state legislatures will have minimal difficulty adapting to the act when it takes effect October 14, 1981.

While most states might consider the statute to be an appropriate model to be adopted by their legislatures, California and Wisconsin may prefer a broader remedy. The two states have distinguished themselves by passing laws which extend search warrant protection to journalists and non-journalists. The California statute, one of the strongest anti-search measures in the nation, absolutely prohibits any surprise search of a news office.

Following the Zurcher decision, the California legislature established statutory protections for the news media by amending section 1524 of the

California Penal Code[73] to prohibit the use of warrants for newsroom searches. Consequently, California law prohibits the issuance of warrants for any "newsperson's" unpublished information, including notes, photographs, tapes and other matter not disseminated to the public through a medium of communication.[74] California has also prohibited police from conducting searches on the offices of attorneys, psychotherapists, and physicians not suspected of crime.

The state of Wisconsin has also enacted legislation providing limited search warrant protection for third parties. The Wisconsin statute authorizes a search for documentary evidence only against persons suspected of a crime, and only in cases where there is a danger that the evidence sought will be destroyed or removed.[75] State statutes recently adopted by Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas, and Washington prohibit newsroom searches unless the news organization or a journalist employed by the organization is suspected of crime. Several of these states also permit searches under certain other limited circumstances.

Summary of Conclusions

Although the Privacy Protection Act of 1980 embodies a limited prohibition of newsroom searches, it may not be regarded as an absolute remedy to Zurcher. The statute's failure to address the "probable cause" standard of the search warrant procedure may reduce its effectiveness in preventing newsroom searches. Further, the vague and overly broad terms of the act's exemptions allow sufficient lattitude for law enforcement officers and magistrates to subjectively construe that probable cause exists to permit a third-party search of a news organization.

Daniel D. Bremer, attorney for the Flint Voice, observed that the new statute probably would not have prevented the searches conducted against

both the Voice and the Stanford Daily.[76] If such is, in fact, the case, the newsgathering and dissemination functions of the press may still be subject to disruption and forced disclosure of confidential information and sources.

Contemporary case law, relative to search and seizure, suggests that "probable cause" is an element which must be scrutinized when Congress drafts enabling legislation relative to the search warrant procedure. In Hayden and in Zurcher, the nation is reminded of the Court's evolving interpretation of probable cause and the social consequences involved. While the most recent legislative remedy has seemingly overlooked this concern, it is hoped that future remedies will address it squarely.

Notes

1. 436 U.S. 547 (1978).

2. "Carter Signs Newsroom Raid Ban," The News Media and the Law 4 (October/November 1980): 3.

3. "Newsroom Searches" (Editorial) Washington Post, 21 October 1980, p. A-18.

4. John Capetta, "Third Party Searches in the Face of Zurcher v. Stanford Daily: Toward a Set of Reasonableness Requirements," Connecticut Law Review 11 (Summer 1979): 660.

5. U.S. Constitution. amend. IV.

6. Henry C. Black, Black's Law Dictionary (5th Ed.). (St. Paul: West Publishing Co., 1979), p. 1081.

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